UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

LIBERTY MEDIA HOLDINGS, LLC Plaintiff, vs. HAWAII MEMBERS OF SWARM OF NOVEMBER 15, 2010 TO JANUARY 27, 2011, SHARING HASH FILE AE340D0560129AFEE8D78CE07F23 94C7B5BC9C05; AND DOES 1 through 12, Defendants.	Case No. 1:11-cv-00262 DAE-RLP (Copyright) **MEMORANDUM IN SUPPORT OF MOTION**

MEMORANDUM IN SUPPORT OF MOTION

Pursuant to a first motion for early discovery and order granting the same, Plaintiff LIBERTY MEDIA HOLDINGS, LLC (hereafter "Plaintiff" or "Liberty") has secured from ISP Time Warner Cable the names and addresses of Internet subscribers whose IP addresses are associated with the AE3 BitTorrent Swarm that engaged in the illegal downloading and distribution of Plaintiff's copyrighted work as alleged in the complaint.

Plaintiff now seeks permission to conduct additional early discovery in order to ascertain with confidence whether or not the subscribers identified by the ISP were the same individuals who engaged in the illegal conduct. Plaintiff also seeks an additional period of time within which to serve the remaining defendants so that Plaintiff will have time to complete the requested discovery prior to identifying and serving the individuals in question.

FACTUAL BACKGROUND

Plaintiff Liberty is a California limited liability company doing business as CORBIN FISHER®. Liberty produces, markets, and distributes adult entertainment products, including Internet website content, videos, DVDs, photographs, etc. Plaintiff operates and maintains a website by and through which individuals who pay a monthly subscription fee can view its photographic and audiovisual works.

Defendant Does 1-12 are individuals whose true names and addresses are unknown to Plaintiff. These Doe Defendants duplicated and distributed unauthorized and infringing copies of Plaintiff's motion picture "Down on the Farm."

On August 5, 2011, pursuant to the subpoena authorized in this case, Time Warner Cable disclosed to Plaintiff the names and contact information of the subscribers assigned the Hawaii based IP addresses implicated in the AE3 Swarm. Certain of the identified subscribers had prior to this time contacted Plaintiff's counsel to work out settlements in response to having been notified by Time

Warner Cable of this lawsuit and Plaintiff's request for subscriber information. Declaration of Counsel, attached.

On or about August 11, 2011, Plaintiff's counsel wrote to the individuals who had been identified as subscribers by Time Warner Cable. Plaintiff's letters explained the basis of the lawsuit and asked that the subscriber settle the dispute or provide Plaintiff with reasons why Plaintiff should not pursue its claims against the identified individual. In some cases the identified subscriber settled with Plaintiff; in other cases no response was forthcoming; and in still other cases the subscriber claimed he or she had not engaged in the infringing conduct but failed to provide any reason why their assigned IP address was implicated when they had not themselves engaged in the alleged infringing conduct, or why they were not themselves responsible for others using their assigned IP address. Declaration of Counsel, attached.

It is helpful to consider the IP addresses like the license plate number of a car implicated in a property crime. At this point, the Plaintiff knows the license plate number of the car that left its premises after a burglary, with surveillance video of the Plaintiff's property sticking out of the car's trunk. This creates a strong implication that the owner of the car committed the burglary, and certainly creates enough cause to name the owner of the car as a defendant. However, the Plaintiff prefers to give the potential defendants more than due process to provide additional assurance against improperly naming a defendant in this case. Judicial economy and justice favors this approach.

To step away from the analogy and offer specifics: Internet subscribers who were assigned one of the IP addressed implicated in the AE3 Swarm are very likely involved in the infringing conduct alleged in the complaint. If they, themselves, did not directly commit the infringing conduct, they may have allowed their Internet connection to be used by others who engaged in the infringing conduct. Our analogous getaway car driver might have been using the car with the owner's permission, and the owner may very well have been part of the entire burglary plan. Similarly, the IP address subscriber may have given the actual infringer permission to infringe using the account, or the subscriber may even have participated in the activity.

However, in our hypothetical burglary, the car owner may have simply been the victim as well. The car could have been stolen before the burglary. Similarly, persons other than the Internet subscriber may be responsible for the infringing conduct as a result of having used the subscriber's Internet connection without the subscriber's knowledge and/or permission. This could occur in a variety of ways, as for example, through an unsecured wireless router. In that case, it could be as if our hypothetical car owner left the keys in the ignition – given the particular circumstances, this could subject the car owner to negligence liability.

Plaintiff intends to take the position that a subscriber who allows his or her Internet connection to be used by third parties for illegal purposes may be liable for the damages thereby caused. That liability will necessarily depend upon the relevant circumstances. It would serve the interests of justice and judicial economy for this Court to authorize additional pre-26(f) discovery. While the Plaintiff certainly has a good faith basis for naming the subscribers as defendants and moving forward with this case against them, the Plaintiff wishes to give them a chance to provide an explanation as to why their "car" was seen leaving the scene of the offense. Should even one be able to provide a reasonable explanation, that would be one defendant who does not need to suffer the consequences of being named as a defendant in this case. Should the Court deny this relief, the Plaintiff will be denied the ability to use a scalpel rather than a shovel to dig out the truth. Neither the Plaintiff, the Court, nor the to be identified Defendants will be served by a denial.

PROCEDURAL BACKGROUND

Plaintiff filed its complaint (Doc #1) in this matter on April 20, 2011, and on that same day filed an ex-parte motion (Doc #4) for an order authorizing Plaintiff to conduct limited early discovery solely for the purpose of identifying the Doe Defendants, initially, through the issuance of a subpoena directed to the Internet Service Provider ("ISP") Time Warner d/b/a Road Runner requesting subscriber information solely within its possession and, thereafter, through written discovery requests and/or depositions of the identified subscribers as may be necessary to indentify each Doe Defendant.

By order issued May 3, 2011 (Doc. #22), this Court granted in part and denied in part Plaintiff's motion for early discovery. That order authorized Plaintiff to issue a subpoena to Time Warner Cable to disclose the subscriber information association implicated IP addresses, but also "decline[d] to allow any further early discovery requested by Plaintiff at this time." Doc. #22, at 10.

Plaintiff promptly served Time Warner Cable with the subpoena as authorized by this Court, on May 6, 2011. Time Warmer Cable did not return the subpoena until August 5, 2011. Time Warner Cable returned the subpoena with subscriber names and contact information for the IP addresses implicated in the AE3 BitTorrent swarm. Declaration of Counsel, attached.

On July 20, 2011, Plaintiff moved this Court, pursuant to Rule 4(m), FRCP, requesting an additional 60 days, or until September 20, 2011, within which to serve the defendants (Doc # 29). This Court granted Plaintiff the additional time in the context of an order issued July 25, 2011 (Doc #30).

On September 11, 2011, Plaintiff noticed the dismissal of Doe Defendants 2, 6, 11 and 12 (Doc # 34) reflecting the Doe Defendants with whom Plaintiff had at that time reached a settlement.

ARGUMENT AND AUTHORITY

This Motion Is Appropriately Determined Without a Hearing

Local Rule 7.2(d) authorizes this court, in its discretion, to "decide any motion without a hearing."

None of the non-settling Doe Defendants have yet been conclusively identified and no defendant has been served with the complaint.

Plaintiff is serving each of the identified Internet subscribers who have not yet settled with Plaintiff with a copy of this motion (see attached Certificate of Service) in order to provide each such subscriber with the opportunity to file a response or request a hearing. In the absence of the receipt of a meritorious response or request for hearing, no purpose would appear to be served by the holding of a hearing on this motion.

The Federal Rules Allow for Early Discovery Upon Showing of Good Cause

The Federal Rules prohibit a party from seeking discovery before the Federal Rules of Civil Procedure Rule 26(f) conference unless specifically authorized by court order. Fed. R. Civ. P. Rule 26(d) (1). Courts have permitted limited discovery prior to a Rule 26(f) conference upon a showing of good cause. See *Semitool, Inc. v. Tokyo Electronic America, Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002). *Arista Records LLC v. Does 1-19*, 551 F. Supp.2d 1, 6-7 (D.D.C.

2008). See generally, 6 Moore's Federal Practice, § 26.121[2] & note 10.1 (3rd ed. 2010).

Plaintiff briefed the issue of early discovery in its first *ex-parte* motion for early discovery (Doc. #4 filed April 20, 2011), which argument and authority Plaintiff now incorporates by reference herein.

As explained in Plaintiff's earlier motion and this Court's order (Doc # 22 issued May 3, 2011) granting in part that motion, courts have developed the following variously described four factors to be evaluated when considering motions for expedited discovery to identify anonymous Internet users: (1) whether plaintiff has identified the doe defendants with sufficient particularity for the court to determine whether the defendants are real persons who can be sued in federal court; (2) whether plaintiff recounts the steps taken to locate and identify the doe defendants; (3) whether plaintiff has demonstrated that the lawsuit can withstand a motion to dismiss; and (4) whether plaintiff has proven the requested discovery is likely to lead to identifying information to allow service of process. *Patrick Collins, Inc. v. Does 1-1219*, No. C 10-14468 LB, 2010 WL 5422569, at *2 (N.D. Cal. Dec. 28, 2010) (citing *Columbia Ins. Co.*, *supra* at 578-80; *IO Group, Inc. v. Does 1-65,* No. C 10-4377 SC, *2010 WL 4055667* at *1 (N.D. Cal. Oct. 15, 2010)).

This Court has already determined, in the context of Doc. #22, that Plaintiff met its burden in establishing the four factors justifying early discovery in the form of a subpoena issued to ISP Time Warner Cable for disclosure of the Internet subscriber information associated with IP addresses implicated in the AE3 Swarm.

Plaintiff submits that it has similarly met its burden, for the same reasons, to conduct additional early discovery in the form of limited depositions and interrogatories of the remaining identified Internet subscribers. The requested discovery is necessary for Plaintiff to determine the true name and addresses of the individuals who performed the infringing acts with a greater degree of certainty. Limited discovery of the identified Internet subscriber is the most direct and least-intrusive way to discover who engaged in the infringing conduct and the degree of the Internet subscriber's culpability. The requested limited discovery is likely to provide the information that will clarify whether it was the subscriber or someone else who engaged in the alleged infringed conduct and if someone else, whether the subscriber was complicit, negligent, or blameless in regard to that conduct. While this could be done after service, after a 26(f) conference, and after considerable consternation, attorneys' fees, and stress on the Defendants' part, it would be more just to avoid this if possible. It is the Plaintiff's belief that the subscribers are guilty, but if even one innocent party is removed from this case, the Plaintiff will be satisfied, as should be the Court, to say nothing for the innocent party.

Additional Time to Serve Defendants Is Warranted

Plaintiff respectfully submits that, since it has prosecuted this case diligently within the confines of the law, it has demonstrated good cause to extend the deadline to serve the complaint. See Fed. R. Civ. P. 4(m) ("[I]f the plaintiff shows good cause for the failure [to serve], the court shall extend the time for service for an appropriate period."); *Voltage Pictures, LLC v. Does 1–5,000*, __ F.Supp.2d __, *2011 WL 1807438* at *n.2 (D.D.C 2011) (granting plaintiff in a copyright suit against Doe defendants a total of 265 days obtain identifying information).

The time that it has taken to identify and serve the Doe Defendants is attributable to the inherent difficulty of learning the identity of the anonymous internet users who are infringing Plaintiff's copyright. Plaintiff moved promptly to subpoena the required information from the ISPs and, thereafter, acted swiftly to contact the Internet subscribers inviting them to settle or provide more information. Plaintiff has demonstrated good cause for an extension because, due to the delay in receiving subscriber records, it requires additional time to complete its investigation and engage in the requested additional early discovery to confirm its good faith belief that the individuals associated with each of the internet protocol ("IP") addresses are the infringers identified in the complaint.

CONCLUSION

The Plaintiff requests that the Court issue the requisite order (1) authorizing the Plaintiff to conduct additional early limited discovery by issuing interrogatories and/or deposing the individual Internet subscribers identified by the ISPs in order to determine whether or not each identified Internet subscriber is a proper defendant in this action; and (2) extending the time within which Plaintiff may serve defendants under Rule 4(m) for a period up to and including 90 days following the issuance of the order.

DATED: Honolulu, Hawaii, September 13, 2011.

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/s/ Seth M. Reiss

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